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Chapter 21: Insurance Law

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CHAPTER 21

Insurance Law

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A. COURT DECISIONS

§21.1. Liability insurance: Additional or omnibus insured. In *Hemingway Brothers Interstate Trucking Co. v. Great American Indemnity Co.*,[1] the plaintiff unsuccessfully attempted to characterize itself as falling within the definition of "an additional or omnibus insured" under a motor vehicle liability policy that had been issued by the defendant. The plaintiff was a common carrier with interstate rights and had entered into an agreement with one Norris, under which Norris had agreed to lease his tractor to the plaintiff and haul plaintiff's trailer from New York City to Portland, Maine. The lease, obviously drawn to place full responsibility for the operation of the trailer on Norris, obligated him to provide the driver, and provided that nothing therein was to be so construed as to make Norris or the driver the agent of the plaintiff. The only controls retained by the plaintiff over the vehicle were the rights to designate the freight to be handled and to specify the routes to be traveled and the destination of the freight. The defendant was the insurer of the Norris tractor under a motor vehicle liability policy which contained a clause that incorporated the language of G.L., c. 90, §34A, defining the term *insured* as follows:

> The unqualified word "insured" includes the named insured and also includes any other person responsible for the operation of the motor vehicle with the express or implied consent of the named insured.[2]

The vehicle was involved in an accident, suit was brought by the injured parties and judgment was recovered against the plaintiff.

and various legislative developments in the Commonwealth arising during the 1970 SURVEY year.[6]

A. UNITED STATES SUPREME COURT DECISIONS

§19.2. Enjoining strikes in breach of contract. By far the most significant and most discussed development in labor law in the 1970 SURVEY year was the case of *Boys Markets, Inc. v. Retail Clerks Local 770*,[1] in which it was held that despite the anti-injunction provisions of the Norris-LaGuardia Act,[2] a federal district court may enjoin a

judgment and brought this action in contract, arguing that the term *insured* as defined in the policy extended to it, and that the defendant should therefore have defended the suit and paid the judgment. The Court rejected this argument, noting that the agreement between Norris and the plaintiff did not place the responsibility of the tractor's operation on the plaintiff; it was, in fact, drafted to avoid this possibility. The plaintiff never had possession nor attempted to exercise control of the tractor-trailer combination. It could not have been responsible for the operation of the motor vehicle with the express or implied consent of the insured, Norris.

The plaintiff here was exposed to a liability against which it was obviously trying to protect itself in the drawing of the lease. In such a situation, it would be advisable to address the problem of liability insurance expressly by requiring the owner of the vehicle to add the lessee as a named insured in the policy.

§21.2. Liability insurance: Obligation to defend insured. The rather delicate problem of the legality of an insurer's defending its insured by insisting upon control of the case, while reserving its rights to disclaim the obligation to pay any judgment recovered against that insured, was presented by *Three Sons, Inc. v. Phoenix Insurance Co.*[1] The plaintiff operated a restaurant in which it was licensed (under G.L., c. 138, §12) to sell alcoholic beverages. Plaintiff's operations were insured by the defendant under a general liability policy which contained a clause excluding

> liability imposed upon the insured . . . as a person . . . engaged in the business of manufacturing, selling or distributing alcoholic beverages, or as an owner or lessor of premises used for such purposes, *by reason of any statute* or ordinance pertaining to the sale, gift, distribution or use of any alcoholic beverage . . . .[2]

Suit was brought against the present plaintiff for injuries suffered by a claimant struck by a motor vehicle operated by a customer of the plaintiff who allegedly had become intoxicated by beverages sold by the plaintiff in violation of G.L., c. 138, §69.[3]

When called upon to defend the action, the insurer indicated that it would be willing to do so only if it could have control of the defense, while reserving its right to disclaim its obligation to indemnify the insured. The insured rejected this arrangement and brought this bill for declaratory relief.

The Supreme Judicial Court first held that the exclusion in the policy was limited to instances in which provisions for civil liability

§21.2. 1 1970 Mass. Adv. Sh. 525, 257 N.E.2d 774.

2 Id. at 525-526, 257 N.E.2d at 775. Emphasis was added by the Court.

3 Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968), noted in 1968 Ann. Surv. Mass. Law §3.14. G.L., c. 138, § 69, is a criminal statute proscribing the sale of alcoholic beverages to intoxicated persons.

were incorporated in the pertinent statute itself as remedies for its violation; here, violation of the statute constituted only evidence of negligence. The Court stated:

> . . . It is clear that the basis of [the underlying] tort action is grounded in the common law doctrine of negligence and not on the violation of a statute. The judge rightly ruled that the . . . action was not within the exclusion clause of the policy.[4]

Finding, therefore, a duty to defend on the part of the insurer, the Court further stated that the insurer was without right to insist upon control of the case when it might later disclaim liability under the policy. In so deciding, the Court expressly recognized the serious dilemma facing an insured in this situation and commented that "[i]f liability is established, or a settlement reached, and the insurer has a valid ground for disclaimer, the insured is left with a liability which, had he been able to defend or settle on other terms, might never have existed."[5] It should be noted that the interests of the insurer and insured are not always parallel in situations such as this. Depending upon how the facts are presented, the third party's claim may or may not fall within the coverage of the policy. The Court was quite properly unwilling to sanction the practice of allowing an unsupervised counsel to represent both the insurer and the insured, for he might succumb to the temptation of performing his task of advocacy in such a way that the case develops in favor of the insurance company paying his fee.

§21.3. Liability insurance: Notice of occurrence. A provision in a homeowner's policy requiring that the company be given written notice "as soon as practicable" after an occurrence was not satisfied by a notice 85 days after the occurrence, where the only apparent excuse was that the insured was not aware that the event was covered until an attorney had an opportunity to examine the policy in detail. This holding of the United States District Court for the District of Massachusetts in *Pawtucket Mutual Insurance Co. v. Dolby*[1] conforms with the rule in Massachusetts and most other jurisdictions.[2]

§21.4. Reinsurance: Definition of loss. What constitutes a loss under a reinsurance policy was considered in *Boston Insurance Co. v. Fawcett*.[1] The Boston Insurance Co. (Boston) insured Yale Express System, Inc. (Yale) under a basic cargo policy which provided coverage

4 1970 Mass. Adv. Sh. 525, 528, 257 N.E.2d 774, 776.
5 Id. at 529, 257 N.E.2d at 777.

§21.3. 1 305 F. Supp. 703 (D. Mass. 1969).
2 See, e.g., Comeau v. Phoenix Assurance Co., 350 Mass. 769, 215 N.E.2d 175 (1966); Brackman v. American Employers' Ins. Co., 349 Mass. 767, 208 N.E.2d 225 (1965); Segal v. Aetna Casualty & Surety Co., 337 Mass. 185, 148 N.E.2d 659 (1958).

§21.4. 1 1970 Mass. Adv. Sh. 823, 258 N.E.2d 771.

for each and every loss in excess of $75,000 under an ICC endorsement. Boston also agreed to pay each and every claim of Yale's shippers and consignees not in excess of $1000. However, under the policy, Boston would be entitled to reimbursements from Yale for the payment of the ICC endorsement claims. Boston, in turn, purchased a reinsurance policy from the defendants which provided that the defendants would indemnify Boston for "the sums which [Boston] shall become liable to pay and shall pay under [the Basic Cargo Policy]." This coverage was limited to "the excess of loss over U.S. $75,000 . . . each and every loss . . . ."[2]

On May 24, 1965, Yale filed a petition for reorganization under Chapter X of the Bankruptcy Act.[3] Prior to that date, Boston had not paid any ICC endorsement claims. After that date, Boston did make payments to various shippers and consignees in amounts less than $1000, the aggregate of which exceeded $75,000. Boston then brought this suit for declaratory judgment seeking, in substance, a judicial ruling that the defendants reinsured Boston against the risk that Yale would be financially unable to discharge the small claims against it, that the aggregate liability would therefore fall upon Boston, and that this event constituted a "cargo loss" within the meaning of the reinsurance policy.

The Supreme Judicial Court refused to accept this reasoning, stating as follows:

> . . . The impairment of Yale's ability to reimburse Boston "for any and all sums . . . which . . . [Boston] shall have paid in connection with [thousands of ICC Form claims]" is not, we think, a "cargo loss" within the meaning of the term "each and every loss" in the reinsurance policies.[4]

The Court therefore directed the entry of a decree declaring the defendants not liable for indemnification as reinsurers.

§21.5. Group disability insurance: Negligent misrepresentation. The case of *Anthony v. Vaughan*[1] held that a beneficiary under a group life insurance policy had no cause of action against the insurer for negligent misrepresentation to the officers and directors of the group insured under the policy. In so holding, the Supreme Judicial Court refused to extend the doctrine of liability for negligent misrepresentation expounded in *Craig v. Everett M. Brooks Co.*[2] on the ground that

> . . . [i]f recovery were permitted, it would extend to an indefinite number of unidentified members of the association holding an

2 Id. at 828, 258 N.E.2d at 775.
3 11 U.S.C. §§501 et seq. (1964).
4 1970 Mass. Adv. Sh. 823, 832-833, 258 N.E.2d 771, 777.

§21.5. 1 1970 Mass. Adv. Sh. 125, 255 N.E.2d 602.
2 351 Mass. 497, 222 N.E.2d 752 (1967).

unknown number of policies. An unknown number of the plaintiff's fellow beneficiaries would be included, embracing persons not present at the meeting at which the alleged misstatement was made.[3]

This reaffirms the limitation upon indeterminant liability drawn in *Ultramares Corp. v. Touche*.[4] The holding of the Court makes it interesting to speculate upon whether a different decision would be compelled if the plaintiff had alleged that the directors and officers of the association were agents of the insured, and that the number of policies and the identities of the insureds were determined at the time the misrepresentation was made.

§21.6. Disability insurance: Definition of disability. Strict delineation of the scope of this chapter might preclude coverage of *White v. Finch*.[1] The decision of the United States District Court for the District of Massachusetts may, however, prove of assistance in the construction of language in disability policies. In *White*, the plaintiff sought disability benefits under the Social Security Act.[2] The section of the act that defines *disability* reads in part:

> . . . The term "disability" means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months . . . .[3]

Although the plaintiff suffered from multiple serious infirmities which were of a permanent nature, the period for which he did not engage in substantial gainful activity covered a span of only 5½ months. Judgment was ordered for the plaintiff. The Court ruled that the word *which* in this definitional section of the act modifies *impairment* rather than *inability*.[4] Consequently, a claimant whose disability persists, but who does resume gainful employment prior to the running of the 12-month period, is not penalized for his industry. The opinion is well reasoned and follows a desirable trend favoring disability claimants.[5]

3 1970 Mass. Adv. Sh. 125, 126, 255 N.E.2d 602, 604. In Craig, the Court allowed a general contractor to recover from a civil engineer and surveyor who negligently placed stakes upon land to be developed by the contractor, although no privity of contract existed between the two parties.

4 255 N.Y. 170, 174 N.E. 441 (1931).

§21.6. 1 311 F. Supp. 307 (D. Mass. 1970).

2 42 U.S.C. §§401 et seq. (1964).

3 Id. §416(i).

4 311 F. Supp. 307, 311 (D. Mass. 1970).

5 In the White opinion, Judge Julian cited a number of cases which have held that "a liberal construction, favoring disability claimants, should be applied when such a construction is reasonable." Ibid. See, e.g., Santagate v. Gardner, 293 F. Supp. 1284, 1288-1289 (D. Mass. 1968); Combs v. Gardner, 382 F.2d 949, 956 (6th Cir. 1967); Rasmussen v. Gardner, 374 F.2d 589, 594 (10th Cir. 1967); Cancel v. Gardner, 268 F. Supp. 206, 209 (D.P.R. 1967).

B. LEGISLATION

§21.7. Regulation of insurers: Powers and duties. Chapter 876 of the Acts of 1970,[1] effective January 1, 1971, represents a major effort to reshape G.L., c. 175, so as to make the Massachusetts Business Corporation Law[2] generally applicable to domestic insurance companies. The commissioner of insurance is designated by the act to administer and enforce those provisions of G.L., c. 156B, which have been made applicable to insurers.[3] The act applies to all domestic incorporated insurance companies existing on or after the effective date of the act.[4] Under Section 14 of the act,[5] domestic insurance companies are authorized, for the first time, to contribute funds to relief organizations approved as such by the commissioner of public welfare, and stockholders may now authorize the companies to make contributions to any organization operated exclusively for charitable, scientific or educational purposes.

Chapter 484 of the Acts of 1970,[6] enacted as emergency legislation effective June 30, 1970, has the dual purpose of restricting the persons by whom, and the manner in which, stock control of domestic insurance companies may be acquired[7] and establishing registration and reporting requirements for insurers which are members of an insurance holding company system.[8] These provisions do much to assure the continuing financial integrity of the affected companies.

Chapter 484 of the Acts of 1970 also extends to all domestic insurance companies the right to engage in other business activity "reasonably complimentary or supplementary to its insurance business,"[9] which right had previously been granted only to domestic life insurance companies.[10] Other acts passed during the 1970 SURVEY year affecting investment powers of domestic insurance companies are Chapter 538,[11] removing the restriction on a domestic life insurance company's investment in income-producing agricultural, horticultural and animal husbandry property; Chapter 580,[12] authorizing limited savings deposits by certain insurers in federal savings and loan associations doing business in the Commonwealth; and Chapter 642,[13]

§21.7. [1] Repealing G.L., c. 175, §§50, 61, amending §§3A, 19A-D, 30, 34, 48, 49, 57-60, 70-71, 77-78, 94, and inserting §§37A, 50-50B.

[2] G.L., c. 156B.

[3] G.L., c. 175, §3A.

[4] Acts of 1970, c. 876, §27. Section 27 of the 1970 amending act is set out in the Editorial Note following Acts of 1970, c. 876, §1, amending G.L., c. 175, §3A.

[5] Inserting in place of G.L., c. 175, § 50, three new sections: §§50-50B.

[6] Amending G.L., c. 175, §§66, 141, and inserting §§47A, 193L-N.

[7] G.L., c. 175, §193M.

[8] Id. §193N.

[9] Id. §47A.

[10] Id. §66D, added by Acts of 1967, c. 530, §2.

[11] Amending G.L., c. 175, §66B.

[12] Amending G.L., c. 175, §63, ¶14B.

[13] Amending G.L., c. 175, §§1, 3, 94, 132, 132B, 132F, 132G, 140, 142, 144.

authorizing life insurance companies to issue contracts on a variable basis in addition to variable annuity contracts.

§21.8. Regulation of insurers: Insolvent insurers. Although the passage of Chapter 261 of the Acts of 1970,[1] creating a "Massachusetts Insurers Insolvency Fund," provides some needed and long-overdue relief to unsuspecting policyholders who equate insurers with financial stability, the act should not be presumed to provide total protection. The act does not apply to "life, accident and health, workmen's compensation, title, surety, disability, credit, mortgage guaranty and ocean marine insurance."[2] The Fund's limitation of liability with respect to any one claim is $300,000.[3] This maximum is further reduced to the extent that a claimant may be entitled to collect under "any insolvency provision" in his own policy,[4] a term whose precise meaning is open to question.

The most important limitation on the Fund's liability is that it is not responsible for any claims against an insolvent insurer arising subsequent to 30 days "after the declaration of insolvency,"[5] a phrase which, although again imprecise, presumably means the date upon which the insurer gives to the commissioner of insurance notice of insolvency.[6] The act makes it discretionary with the commissioner whether to require the Fund to give any notice of the insolvency to policyholders and other interested parties.[7] It is submitted that fairness dictates that such a notice be mandatory and that it be given to policyholders within the 30-day period during which the Fund is providing protection.

The Fund members consist of all domestic insurers writing the types of insurance covered by the Fund, each of which must contribute, pro rata, up to 2 percent of its net direct written premiums for the previous year to satisfy claims against the Fund.[8] If the contributions are insufficient to satisfy all claims, available funds shall be prorated, and the unpaid portion of any unsatisfied claim shall be paid as soon as funds become available.[9] Not unexpectedly, the policyholders of the nonexempt insurances will be called upon to absorb the entire costs of operating the Fund by means of increased premiums.[10]

In addition to paying claims, the Fund is designed to serve as a watchdog on the solvency of its members; this, it is hoped, will prevent the insolvencies giving rise to the claims. The Fund may make

§21.8. 1 Inserting G.L., c. 175D, §§1-16.
2 G.L., c. 175D, §2.
3 Id. §5(1)(a).
4 Id. §9.
5 Id. §5(1)(a).
6 See id. §7(1)(a).
7 G.L., c. 175D, §7(2)(a).
8 Id. §5(1)(c).
9 Ibid.
10 Id. §13.

reports to the commissioner which will not be open to public inspection, and may make recommendations for the detection and prevention of insolvencies; and, in both instances, the Fund is absolved of all liability for any statements made by it.[11]

§21.9. Policies and premiums: General. Chapter 598 of the Acts of 1970[1] implements the National Flood Insurance Act of 1968[2] by authorizing issuance of policies for flood disaster insurance by an "association" of insurers. Any "association" policy must designate one company to whom notice of loss may be given and upon whom service of process may be made by a policyholder. Association policies issued by mutual companies need not conform with the requirements that policyholders be members of the company and entitled to the privileges thereof.

Chapter 504 of the Acts of 1970[3] permits insurance agents to offset amounts due an insured by way of return of premiums against amounts due from the same insured on any other policy issued by the same insurer. This act does not make the same provision for insurance brokers, who presumably must still pay over all returns of premiums under threat of criminal sanction.

§21.10. Political subdivisions: Employee insurance coverage. Chapter 382 of the Acts of 1970[1] authorizes towns to provide insurance and compensation for their call fire fighters or volunteer fire company members whose service as such is approved by the town board of selectmen. The act guards against receipt of double compensation by fire fighters so covered. The title of the act suggests that it extends coverage to reserve, special, and intermittent police officers, but, as enacted, the act makes no provision for these groups.

Chapter 269 of the Acts of 1970[2] permits employees (including retired employees and deferred retirees) of political subdivisions to treat all group insurance coverages offered by the political subdivision as separable, and to apply for selected portions of the coverage.

Chapter 626 of the Acts of 1970[3] permits political subdivisions to transfer their obligation to provide group life and health insurance for retired teachers and their dependents to the Group Insurance Commission. Provision is made to insure continued, uninterrupted coverage upon the transfer. A political subdivision so electing to transfer its obligation is required to reimburse the commission for its pro rata

[11] Id. §§5(2)(e)-(f), 14.

§21.9. [1] Amending G.L., c. 175, by inserting §102D.
[2] 42 U.S.C.A. §§2414, 4001 et seq.
[3] Amending G.L., c. 175, §187B.

§21.10. [1] Amending G.L., c. 32, §85H, and G.L., c. 40, §5(1).
[2] Amending G.L., c. 32B, §5.
[3] Amending G.L., c. 32B, §10, and adding G.L., c. 32A, §§12-13, and G.L., c. 32B, §11E.

share of the cost as determined by the commission. The commission is not required to accept an application of a political subdivision if deemed not to be in the best interests of the Commonwealth, the political subdivision, and the employees, particularly in view of past claim experience and premium costs of the political subdivision.